UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIFFANY (NJ) INC. and TIFFANY AND COMPANY, Plaintiffs, v. eBAY INC., Defendant.	Case No. 04 Civ. 4607 (KMK)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S MOTION IN LIMINE TO EXCLUDE THE PROPOSED EXPERT TESTIMONY OF GEORGE MANTIS

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PRELIMINARY STATEMENT

In opposing eBay's motion to preclude Mr. Mantis' testimony and the Buying Programs, Tiffany attempts to lower the bar for admission of purported "expert" testimony so low as to render that bar meaningless. Tiffany thus asks this Court merely to admit Mr. Mantis' Buying Programs into evidence without evaluating eBay's substantive criticisms of the core flaws in the Buying Programs' design and implementation. Tiffany's opposition runs afoul of Rule 702 of the Federal Rules of Evidence and Supreme Court directives that trial courts are to play a necessary gatekeeper role, ensuring that expert testimony is both relevant and reliable prior to admission into evidence.

Indeed, the Supreme Court's Daubert decision and Rule 702 require the district court to rigorously examine whether Mr. Mantis' testimony and the Buying Programs he designed rest on a reliable foundation, are based on sound statistical sampling methodology and principles, and are relevant to Tiffany's claims. Here, the design and implementation flaws in the Buying Programs are so serious that the Buying Programs are neither relevant nor reliable. In designing the Buying Programs, Mr. Mantis violated several principles of statistical sampling, most notably by deciding blindly to adopt search parameters that were designed to maximize the identification of counterfeit listings and to search only a small subset of eBay listings relevant to Tiffany's claims. These are foundational errors—not "quibbles" or "nitpicking"—that cannot be rectified and must preclude the admissibility of the Buying Programs.[1]

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[1] The factual errors in Tiffany's Counterstatement of Facts and footnote 11 concerning eBay's fee practices, member support services, and proactive searches for listings containing the word "Tiffany" reveal that Tiffany misapprehends governing trademark law. See Inwood Labs, Inc. v. Ives Labs., Inc., 456 U.S. 844, 854 (1982) ("[I]f a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit.").

ARGUMENT

I. EXPERT TESTIMONY MUST BE RELEVANT AND RELIABLE TO BE ADMITTED INTO EVIDENCE

In Daubert, the Supreme Court made clear that the district court has a "gatekeeping" function under Rule 702. It is charged with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert v. Merrel Dow Pharms., Inc., 509 U.S. 579, 597 (1993). In Amorgianos v. Nat'l R.R. Passenger Corp., the Second Circuit definitively set forth "how the district court is to perform this critical function." 303 F.3d 256, 259 (2d Cir. 2002).

In assessing the proffered testimony's relevance, trial courts are instructed to look to the standards of Rule 401, namely, whether the testimony "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Amorgianos, 303 F.3d at 265. In assessing the reliability of the evidence, the court "must focus on the principles and methodology employed by the expert." Id. at 266 (citing Daubert, 509 U.S. at 595 (stating that "[t]he focus [of a Rule 702 inquiry] must be solely on principles and methodology")). If the expert opinion is based on a methodology or data that are inadequate to support the conclusions, Daubert and Rule 702 mandate the exclusion of the unreliable expert testimony. See id. Indeed, "to warrant admissibility, . . . it is critical that an expert's analysis be reliable at every step" and "any step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible." Id. at 267 (emphasis in original); see also Bellis v. Tokio Marine & Fire Ins. Co., Ltd., No. 93 Civ. 6549(DAB), 2006 WL 6488013, at *2 (S.D.N.Y. Mar. 14, 2006) (granting motion to preclude plaintiff's experts pursuant to Amorgianos and Daubert); Economist's Advocate, LLC v. Cognitive Arts Corp., No. 01 Civ.9468 RWS, 2004 WL 2429804, at *2

(S.D.N.Y. Oct. 29, 2004) (same). This rigorous analysis is necessary "to ensure that the courtroom door remains closed to junk science." Amorgianos, 303 F.3d at 267.

Tiffany's argument that expert testimony is "liberally admissible" and that eBay's criticisms of the Buying Programs therefore merely "go to the weight to be accorded to [Mr. Mantis'] testimony, not its admissibility" does not conform with prevailing Second Circuit case law.[2] Tiffany's claim that eBay's criticisms of Mr. Mantis' flawed statistical methodology "do[] not form the proper basis for a Rule 702 motion," Tiffany Br. at 13, contradicts the guidelines the Second Circuit set forth in Amorgianos—the controlling authority in this circuit which Tiffany's argument fails to follow or cite. See 303 F.3d at 266 (holding that in the Rule 702 inquiry, "the district court must focus on the principles and methodology employed by the expert"). The Second Circuit authorities Tiffany uses to support its argument predate Amorgianos and are inapposite to Tiffany's position. See Scherring Corp. v. Pfizer Inc., 189 F.3d 218, 228 (2d Cir. 1999) (stating that methodological errors in a consumer survey "go only to the weight of evidence" in a hearsay challenge to the survey—not, as here, a challenge to a statistical sample's admissibility pursuant to Rule 702); McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1996) (holding that after a witness is qualified as an expert and his testimony is admitted, further criticism of the expert's credentials and methodology go to the weight of the testimony); Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 22 (2d Cir. 1996) (holding that the district court "abused its discretion" in admitting expert testimony based on an "unrealistic and speculative assumption").

[2] Tiffany Br. at 1, 5, 7, 10, 12, 16 and 18.

II. THE BUYING PROGRAMS ARE IRRELEVANT AND UNRELIABLE

Tiffany's dismissals of eBay's substantive criticisms of the Buying Programs are without merit. Indeed, Tiffany's defense of the relevance and reliability of the search criteria used in the Buying Programs reveals that neither Tiffany nor Mr. Mantis fully understands the effect these terms had on the validity of the Buying Programs. Moreover, Tiffany's post-hoc explanations cannot save the Buying Programs' flawed design and implementation.

A. Mr. Mantis' Flawed Sample Design Renders The Buying Programs Irrelevant And Unreliable

In statistical sampling, it is critical that the statistician define the correct universe to be sampled because the "population [universe] comprises . . . the objects that are relevant to the subject matter of the litigation." Mantis Dep. at 30 (emphasis added). Thus, as Mr. Mantis admits, "the starting point in any sampling procedure is to define the population [universe] of items from which the sample is to be drawn" based on "objective non judgmental criteria." Buying Program Protocol at 2.[3]

In the Buying Programs, however, Tiffany chose samples under artificial conditions from an overly-narrow and biased universe of listings that did not capture the entire universe of listings relevant to Tiffany's claims. Indeed, Mr. Mantis blindly adopted as the search criteria for his ostensibly objective sample universe the criteria used by Tiffany's anti-counterfeiting personnel in policing Tiffany's trademarks. Tiffany developed these search criteria, which searched a significantly limited universe of listings, to maximize Tiffany's chances of finding listings offering counterfeit items in the course of its policing activities. Mr. Mantis' failure to independently designate an appropriate and objective universe constitutes a significant deviation from basic statistical methodology that renders the Buying Programs unreliable and irrelevant to Tiffany's claims. See Daubert, 509 U.S. at 589 ("[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.").

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[3] eBay Exhibit 266.

To this day, Tiffany and Mr. Mantis fail to recognize that by only searching for listings containing the words "Tiffany" and "Sterling" in listing titles or descriptions, the Buying Programs did not sample the universe of listings relevant to Tiffany's claims—whether that universe is defined as Tiffany jewelry items, or, as Tiffany now claims, just "silver jewelry" items. Tiffany Br. at 13. eBay's Boolean search engine will only return listings that contain both the words "Tiffany" and "Sterling" in the listing's title or description. See Buying Program Protocol at 2 (describing the search Tiffany performed). While the search may return some listings for Tiffany silver jewelry, this is entirely dependent on whether the seller included the words "Tiffany" and "Sterling" when drafting the listing's title or description. The search criteria Tiffany used could not capture the relevant universe of Tiffany silver jewelry items because "silver" was not one of Tiffany's search terms. Tiffany is thus wrong to claim that "the focus of the Buying Programs was on silver jewelry" and that the programs "are relevant for what they demonstrate regarding the sale of silver jewelry on eBay." Tiffany Br. at 14. These claims are baseless given the search terms used and the functions of the eBay search engine.[4]

Tiffany does not deny that these terms were designed to specifically identify counterfeit listings. Indeed, it merely offers its vague assurance that the use of these same terms

[4] Tiffany's claim that the "search term 'Tiffany Sterling' elicited more silver items in the Buying Programs which did not include the word 'sterling' than which did" is flawed. Tiffany Br. at 14. As explained above, given the criteria used and the functions of the eBay search engine, all listings returned contained the words "Tiffany" and "Sterling" in the listings' titles or descriptions. Based on Tiffany's statements in footnote 9 of its opposition brief, Tiffany's analysis must have been limited to whether the search terms appeared in the listing's title only. See Tiffany Br. at 14, note 9. The Buying Programs, however, searched the listing's title and description.

as the basis for the Buying Programs was "entirely appropriate." Tiffany Br. at 15. Since Tiffany failed to provide any substantive justification for applying this biased and limited data to the broader universe of listings on the eBay website relevant to Tiffany's claims, the Buying Programs and Mr. Mantis' testimony should be excluded from the trial in this matter. See General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) ("[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.").

Tiffany also fails to recognize that, by suspending its standard practice of policing the use of its mark on the eBay website during the Buying Programs (such that eBay could remove listings reported to it by Tiffany), the universe of listings available for sampling during that time was not representative of "real world" conditions because the number of listings of counterfeit items was artificially inflated. It is a fundamental tenet of trademark law that trademark owners have the duty to police their trademarks. See S. Rep. No. 93-1400 (1974), reprinted in 1974 U.S.C.C.A.N. 7132, 7136 ("Effective enforcement of trademark rights is left to the trademark owners"); 2 McCarthy on Trademarks and Unfair Competition § 11:91 (4th ed. 2006) ("[C]orporate owners of trademarks have a duty to protect and preserve the corporation's trademark assets through vigilant policing and appropriate acts of enforcement."). Tiffany cannot abandon its duty to police its marks and then hold third parties, like eBay, responsible for failing to protect its interests.

B. The Paralegals' Haphazard Implementation Of The Buying Programs Compounded The Fundamental Design Flaws

In the Buying Program Protocol, Mr. Mantis stated that a "sample size of 200 [items] would appear to be sufficient" and stressed that "[i]t is important that each randomly selected item is in fact purchased." Buying Program Protocol at 4, 6. Tiffany's claim that "[t]here is no evidence that [the paralegals] varied from their instructions" does not withstand scrutiny. Tiffany Br. at 18. Indeed, in addition to the significant flaws in Mr. Mantis' sample design, the Buying Programs and Mr. Mantis' testimony are inadmissible under Rule 702 and Daubert due to the paralegals' haphazard implementation of the programs.

Tiffany stresses that the Buying Programs are reliable because the items selected were "chosen on a random basis without exercise of subjectivity." Tiffany Br. at 1. In statistics, however, "random" does not mean "haphazard." As even Mr. Mantis, who is not a statistician, notes, "[i]n order to have a random selection method, procedures must be established that assure that all items of interest . . . have an equal and independent chance of being selected for purchase." Buying Program Protocol at 1 (emphasis added). Mr. Mantis, however, did not establish such procedures for the Buying Programs. He failed to consider eBay's different duration listing formats, and the paralegals committed numerous double-counting errors when selecting the items for purchase.[5] Both of these errors resulted in items having different probabilities of selection—contravening Mr. Mantis' instructions.

Moreover, it is undisputed that the paralegals only purchased 186 items in the 2004 Buying Program and 139 items in the 2005 Buying Program—not the 200 Mr. Mantis described as "sufficient" in his protocol. Buying Program Protocol at 4; see also id. at 6-7 (explaining various methods the Tiffany paralegals should use to assure that "each randomly selected item is in fact purchased"). Now, long after the paralegals failed to adhere to the protocol, Mr. Mantis and Tiffany, like "Monday morning quarterbacks," claim that a sample size of 150, 100, or even 80 items would have sufficed. See Tiffany Br. at 17-18; Mantis Dep. at 78-80. The contrast between Mr. Mantis' instruction in his protocol regarding the necessary sample

[5] See Memorandum of Law in Support of Defendant's Motion in Limine to Exclude the Proposed Expert Testimony of George Mantis at 14-16 (describing these errors in detail).

size and the statements he made at his deposition after learning about the paralegals' failures, speaks volumes concerning the reliability of the Buying Programs' statistical sampling methodology.

Pursuant to the Second Circuit's instruction in Amorgianos, Mr. Mantis' testimony and the Buying Programs must be "reliable at every step" to warrant admission. 303 F.3d at 267. Given the fundamental flaws in Mr. Mantis' statistical methodology and the paralegals' haphazard implementation of the programs, Mr. Mantis' testimony and the Buying Programs must be excluded from the trial in this matter.

III. TIFFANY FAILS TO ADDRESS THE FACT THAT MR. MANTIS IS NOT QUALIFIED TO DESIGN STATISTICAL SAMPLES OF OBJECTS

In its opposition brief, Tiffany fails to address the gravamen of eBay's objection to the qualification of Mr. Mantis as an expert in this litigation. eBay does not dispute that Mr. Mantis has been retained as a survey research expert to perform "shopping mall" surveys to disprove the likelihood of confusion. But this does not qualify him as a sample statistician—a wholly different field of study. See Ericksen Report at 3-4 (describing the field of statistical sampling). Indeed, Tiffany in its opposition concedes that the Buying Programs are different from the consumer surveys that Mr. Mantis has performed in the past. See Tiffany Br. at 4 ("[T]he Buying Programs were not designed to test confusion. . . ."). Mr. Mantis lacks the academic training and professional experience necessary to design and implement a statistical sample of items—or objects—on the eBay website, an online marketplace where billions of items across more than 50,000 categories have been offered by third-party sellers. Tiffany claims that Mr. Mantis has "taken courses in statistical sampling through work and various seminars," but, as Mr. Mantis explained in his deposition, these seminars are only for "a day or two." Mantis Dep. at 9. These courses and seminars do not equate to the level of knowledge attained through undergraduate and graduate studies by statisticians working in the specialty field of statistical sampling. See Ericksen Report at 3-4. More importantly, Mr. Mantis lacks practical experience performing surveys of "objects," such as the Buying Programs, which he admitted he has not performed since his school days. See Mantis Dep. at 40-41. Therefore, Mr. Mantis should not be qualified as an expert witness in this proceeding because he lacks both academic and professional training in designing statistical samples of objects. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) (holding that the district court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

CONCLUSION

For all the foregoing reasons, eBay respectfully submits that the opinion and testimony of George Mantis must be excluded from the trial in this proceeding.

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